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# CONTRACT DRAFTING AND REVIEW MANUAL

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# INTRODUCTION

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The contract manual is intended as a guide for drafting and reviewing contracts between an agency of the State of North Dakota and other entities or persons. It has been written so that a preliminary draft of a proposed contract could be prepared by a non attorney for review by the agency's assistant attorney general or special assistant attorney general.

Although contracts are the product of policy decisions by the agency, it is appropriate for the Attorney General to determine the legality of all contracts and offer suggestions and recommendations on contract terms and language before a proposed contract is forwarded to the other party.

**Each agency should contact its assistant attorney general or special assistant attorney general before entering into any contract.**

This is particularly important if the contract contains unique or novel issues, imposes a significant financial obligation on the state, or relates to a project that could create significant liability for the state. Any contract obligating more than \$250,000 should be reviewed by an assistant attorney general or your agency's special assistant attorney general. Once a form contract has been approved by the Office of Attorney General or your agency's special assistant attorney general, subsequent reuse of the form contract need not be reviewed unless it contains substantive revisions or obligates more than \$250,000.

The analysis in this manual summarizes current law and is not an Attorney General's opinion.

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# CHAPTER 1 - OVERVIEW OF CONTRACT PROCESS

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## Purpose of Contract Review

The main purpose of contract review is to ensure that the expectations of the agency and the contractor are accurately described in a written contract. A well written contract avoids unexpected liabilities and promotes a smooth relationship between the agency and the contractor.

Contracts should be reviewed to ensure that the agency complies with all applicable laws and is not committing itself to spending money beyond the amount appropriated by the Legislature. **This review is particularly important for contracts that were not drafted by the agency.**

State agencies and officials have only those powers expressly provided by law or which may necessarily be implied from the powers expressly given to the official or agency.<sup>1</sup> Every review of a contract must include a determination whether the agency is authorized to enter into the proposed contract.

Since the state is not immune from liability for its actions, all state contracts should indicate how risks arising out of the contract are assigned among the parties to the contract and what insurance coverage is required.

## Role of the Agency

Once an agency determines that goods or services are needed from a specific contractor,<sup>2</sup> or that another reason exists to enter into a contract, the agency must develop a written agreement identifying the terms and conditions of the relationship between the agency and the contractor.

The most important responsibilities of an agency in establishing these terms and conditions are to:

1. describe the goods or services the agency is purchasing or providing;
2. state the dollar amount the agency will pay or receive;
3. determine how any risks of liability will be assigned among the parties to the contract; and
4. state how the parties will comply with all applicable laws.

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<sup>1</sup> State administrative agencies are creatures of legislative action and, as such, have only such authority or power as is granted to them or necessarily implied from the grant. *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584 (N.D. 1984).

<sup>2</sup> See N.D.C.C. ch. 54-44.4 and N.D.A.C. art. 4-12 regarding bidding requirements for goods and services.

In determining how much the agency will pay, the agency should keep in mind that its ability to extend financial obligations beyond the current biennium is restricted. See N.D.C.C. §§ 54-16-03<sup>3</sup>, 54-16-05, 54-44.1-10.

### **Role of the Attorney General**

All state officers must look to the Attorney General for opinions on legal questions relating to their official duties. N.D.C.C. § 54-12-01(6). The Attorney General is also required to prepare drafts of state contracts when necessary. N.D.C.C. § 54-12-01(7). Although contracts are the product of policy decisions by the agency, it is appropriate for the Attorney General to determine the legality of all contracts, which should occur before a proposed contract is forwarded to the other party.

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<sup>3</sup> “A state officer may not expend, or agree or contract to expend, any amount in excess of the sum appropriated for that expenditure, and may not expend an amount appropriated for any specific purpose or fund or for any other purpose without prior approval in the form of a transfer approval or expenditure authorization as provided in this chapter. The office of management and budget shall provide information to the emergency commission with respect to all emergency requests. Any debt or deficit created by a state officer in violation of this section is void.”

## CHAPTER 2 - TYPES OF STATE CONTRACTS

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### Leases of Buildings or Real Property

All leases and rental agreements for office space must be reviewed for legal sufficiency by the Attorney General and approved by the Office of Management and Budget (OMB). N.D.C.C. § 54-21-24.1. The standard lease form is included in the Appendix to this manual. See also **E: Landlord's Obligations and State's Obligations**. OMB's procedure for completing a state office lease may be found at: <http://www.state.nd.us/fac/forms/leaseprocedure.htm>.

### Leases of Equipment

Leases of equipment can be converted to rental purchase agreements with the approval of OMB, as long as the conversion is to the financial advantage of the state and the agreement does not commit the state to payments beyond the current biennium. N.D.C.C. § 54-06-17. OMB has created a form to assist an agency in making this determination. The instructions and form may be found at: <http://www.state.nd.us/fiscal/docs/leasevspurchinstruct.doc> and <http://www.state.nd.us/fiscal/docs/leasevspurchase.xls> respectively.

### Contracts for Services

Make sure the service contract does not make the contractor an "employee" of the state. See **Y: Independent Entity**. Note also that an agency may be required to obtain services on a competitive basis. See N.D.C.C. ch. 54-44.4; N.D.A.C. art. 4-12 and the OMB Procurement Office at: <http://www.state.nd.us/csd/spo/>.

Architect, engineer, and land surveying services are governed by N.D.C.C. ch. 54-44.7.

### Contracts for Goods

Most materials, furniture, fixtures, printing, insurance, and other commodities used by state agencies are purchased through OMB if the price of the goods exceeds a certain threshold. See generally N.D.C.C. ch. 54-44.4. An agency may be required to obtain goods on a competitive basis. See N.D.C.C. ch. 54-44.4; N.D.A.C. art. 4-12 and the OMB Procurement Office at: <http://www.state.nd.us/csd/spo/>.

### Joint Powers Agreements

Joint powers agreements are a special category of contracts in which a state agency enters into a binding agreement with another state agency or with a

political subdivision of the state. Joint powers agreements may be used for a number of purposes, including: acquiring, constructing, and maintaining any building for the joint use of the contracting government agencies; the use of buildings under the control of the state; and the joint exercise of any power or function that any of the parties to the agreement is authorized to perform. See generally N.D.C.C. chs. 54-40, 54-40.3.

Any joint powers agreement involving the use of state property (N.D.C.C. ch. 54-40) or the exercise of a state power or function between the state and a political subdivision must be reviewed by the Attorney General for legal sufficiency. N.D.C.C. §§ 54-40-08, 54-40.3-01(2). Joint powers agreements do not relieve the agency of its statutory duties, but actual and timely performance of those duties by another party created by the joint powers agreement is sufficient. N.D.C.C. § 54-40.3-01(3) and N.D.A.G. 94-F-08.

Joint powers agreements authorized under N.D.C.C. ch. 54-40 must contain certain provisions. Joint powers agreements authorized under N.D.C.C. ch. 54-40.3 have no required form, but a number of suggested contract topics are listed in N.D.C.C. § 54-40.3-01(1).

### **Agreements with Indian Tribes**

Some agreements between a state agency and an Indian tribe are governed by N.D.C.C. ch. 54-40.2. If N.D.C.C. ch. 54-40.2 applies, the state agency involved must publish notice of the agreement and, if requested, hold a public hearing. These agreements must be approved by the Governor and by the governing body of the tribes involved. N.D.C.C. § 54-40.2-04. In addition, agreements with an Indian tribe may implicate federal statutes and regulations.

### **Contracts for Public Improvements**

The contracting process for public improvement projects is subject to numerous specific requirements in N.D.C.C. chs. 48-01.2. and 48-02. All bids and proposals for public improvement contracts must include a copy of the license or certificate of renewal thereof issued by the secretary of state enclosed in the required bid bond envelope showing the contractor is licensed as provided in N.D.C.C. ch. 43-07. N.D.C.C. § 43-07-12. Contractors with the state also must file a certificate showing the contractor has paid all applicable state taxes. N.D.C.C. § 43-07-11.1.

A bidder's bond and a contractor's or performance bond are required for many public improvement and construction projects. N.D.C.C. ch. 48-01.2, N.D.C.C. §§ 48-01.2-05, 48-01.2-10. A bidder's bond generally must guarantee execution of both a contract and a contractor's or performance bond within ten days after receiving notice that the contract has been awarded. A contractor's or performance bond must guarantee the contractor's performance of the contract



and payment of all bills arising during the performance of the contract. A contractor's or performance bond must include requirements that:

1. all bills or claims for labor or material be paid, including interest under N.D.C.C. § 13-01-14, for bills which are not paid within 90 days; and
2. the contractor will file a payroll report with workforce safety and insurance and pay all required premiums. N.D.C.C. §§ 48-01.2-10, 65-04-10.

All construction contracts, except those involving federal aid or where a preference would be contrary to law, must include a clause requiring the contractor to give preference to North Dakota residents in hiring, with preference given first to veterans. N.D.C.C. § 43-07-20.

With some exceptions, any retention of amounts due to a contractor under a public improvement contract is limited to 10% of each estimate presented until the project is 50% complete. N.D.C.C. §§ 43-07-23, 48-01.2-13.

## CHAPTER 3 - PROCUREMENT

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### Goods

Goods purchased by OMB on behalf of state agencies under N.D.C.C. ch. 54-44.4, or pursuant to purchasing authority delegated by OMB, are usually purchased under a competitive procurement procedure. OMB develops specifications, receives bids, and may reject any bids or negotiate for a lower price with the successful bidder. Term contracts and multiple awards for certain contracts are also authorized. N.D.C.C. § 54-44.4-05. For more information regarding the bidding process, see OMB's Procurement Office website at: <http://www.state.nd.us/csd/spo/>.

### Bids

For certain contracts, competitive bids are required. Examples of these contracts include:

1. Contracts for construction of public improvements if the estimated cost exceeds \$100,000. N.D.C.C. § 48-01.2-04.
2. Concessions in public buildings or on public grounds. N.D.C.C. § 48-09-01.
3. Highway construction contracts exceeding \$20,000. N.D.C.C. § 24-02-17.
4. State printing contracts. N.D.C.C. ch. 46-02.
5. State purchasing contracts. N.D.C.C. § 54-44.4-05.

An agency subject to bidding requirements should be very careful to review and follow all requirements set out in law and administrative rule.

### Proposals

A request for proposals, often referred to as an "RFP," is similar to the bid process but gives the agency additional flexibility after receiving proposals from potential contractors. Frequently, the process includes competitive negotiation with the bidders based on a comparison of the proposals received by the agency.

### Requests for Bids or Proposals

When preparing a request for bids or proposals, the agency should specify both the terms and conditions it will require in the contract and those that are unacceptable. This gives potential contractors notice of the state's contracting requirements. Solicitation templates are available at OMB's Procurement Office website at: <http://www.nd.gov/spo/>.

## **Architect, Engineer, and Land Surveying Services**

The procurement of architect, engineer, and land surveying services is governed by N.D.C.C. ch. 54-44.7. The standard architectural contracts used by the American Institute of Architects favors the architect, and must be amended with consultation from your assistant attorney general or special assistant attorney general. Engineering standard contracts, likewise, are written in the engineer's best interest, and should be given legal review.

# CHAPTER 4 - CONTRACT FORMATION & INTERPRETATION

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## Essential Elements of a Contract

A "contract" is an agreement to do or not do a certain thing. N.D.C.C. § 9-01-01(1). The four essential elements of a valid contract are:

1. parties capable of contracting;
2. the consent of the parties;
3. a lawful object; and
4. sufficient cause or consideration.

The terms of a contract also must be reasonably definite and certain for the contract to be enforceable. N.D.C.C. § 9-01-02.

It is essential to the validity of the contract, not only that the parties should exist, but that it should be possible to identify them. N.D.C.C. § 9-02-03.

Any benefit conferred upon a promisor or prejudice suffered by a promisee is valid consideration for a contract. N.D.C.C. § 9-05-01. A written contract is presumptive evidence of consideration. N.D.C.C. § 9-05-10.

## Contract Interpretation

Contracts are generally governed by the law in effect when the contract is formed. The language of a contract governs its interpretation if the language is clear and explicit and does not involve an absurdity. A contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting if that intent can be determined and is lawful. For written contracts, the intent of the parties must be determined from the writing alone if possible. A contract must be interpreted as a whole, giving effect to every clause, sentence, or provision consistent with the main purpose of the contract. Words in a contract are given their ordinary meaning unless used in a technical sense. See generally N.D.C.C. ch. 9-07.

If the contract is unambiguous, its interpretation is a question of law and extrinsic evidence is not admissible to contradict the terms of the agreement. If a contract is ambiguous, extrinsic evidence can be used to clarify the parties' intent. Whether a contract is ambiguous is a question of law. A contract is ambiguous when rational arguments can be made for different positions about its meaning. If extrinsic evidence is used to interpret an ambiguous contract, the parties' intent is a question of fact.

## Public Contracts

Contracts involving government agencies or officials are generally interpreted under the same rules as contracts between private parties. N.D.C.C. § 9-07-01. However, in public contracts, any ambiguity or uncertainty is presumed to be caused by the private party and is interpreted against the private party. N.D.C.C. § 9-07-19.

## Form of Contract

A state agency contemplating entering into a contract should review the checklist attached as Appendix A before beginning the drafting process. State contracts should be in writing with numbered pages. Certain contracts are invalid unless they are in writing. See N.D.C.C. § 9-06-04. Numbering the separate clauses in a contract can make the agreement clearer and make internal cross-references easier. If the contract has been modified from an earlier draft, make sure to update any internal cross-references.

A written contract supersedes all oral negotiations that preceded or accompanied the execution of the contract. N.D.C.C. § 9-06-07.

If an agency receives a “boilerplate” or “form” contract from a contractor that does not contain the provisions this manual advises all agencies to use, **the agency should contact its assistant attorney general or special assistant attorney general.**

## Language

Definitions should be included for words and phrases that are unclear or are frequently used in the contract. If the same phrase identifying a thing or entity is used frequently throughout the contract, a shortened form should be indicated early in the document to avoid repetitive use of a needlessly long term or phrase.

Contract language does not have to be complicated or wordy to be effective. Certain words are used in contract drafting either because they sound or look legal and important, or because it has “always been done that way.” Occasionally some of this legalese may actually be needed, but generally it should be avoided. Surplus language should be removed unless it makes the contract clearer. Use certain words carefully.

- The term “**shall**” describes what a party is required to do. Use “shall” when imposing a duty on a person or body that is the subject of the sentence. Use “shall” in a mandatory or imperative sense. Example: The licensee shall give the debtor a copy of the signed contract.

- The word “**must**” describes conditions that have to exist before something else happens. Use “must” in reference to a thing rather than a person and to express status requirements, i.e., statements about what people or things must be rather than what they must do. Examples: “The contract must contain two signatures.” “A candidate must be a resident of the county.”
- Use “**may**” to confer a power, privilege, or right. Example indicating power: “The state may demand an extension of time.” Example indicating privilege: “The state may renew the application.” Example indicating right: “The state may appeal the decision.”
- Do not use **such** as a substitute for “the”, “that”, “it”, “those”, “them”, or other similar words.
- Omit needless words. Examples: Change “including, but not limited to” to simply “including.” Change “until such time as” to “until.”
- Use “**which**” to introduce a nonrestrictive clause. Example: “The application, which need not be verified, must be signed by the applicant.” Use which to modify a remote antecedent in a restrictive clause. Example: “An application to renew a license which has been rejected . . .”
- Use “**that**” to introduce a restrictive clause modifying the nearest antecedent. Example: “An application to renew a license that has been revoked . . .”

Every two years, the Legislative Counsel publishes a Legislative Drafting Manual. This manual contains a chapter on style and grammar. While the manual is written as a resource to use for drafting legislation, it is an excellent resource for any type of writing. This manual is available at:

<http://www.legis.nd.gov/information/bills/draft-manual.html>.

# CHAPTER 5 - RECOMMENDED CONTRACT CLAUSES AND ALTERNATIVES

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## A: IDENTIFYING THE PARTIES AND PURPOSE

Contracts frequently include "recitals" at the beginning of the agreement that identify the parties to the agreement and the purpose of the agreement. Although not legally required, recitals can effectively explain the agreement, which will help in understanding the remaining terms of the contract.

A contract should begin with a recital identifying the parties to the contract. Except for contracts between state agencies, the state, rather than a particular agency or official, is the real party to state contracts. For contracts between state agencies, separate terms describing each agency should be used.

Except for contracts between state agencies, the state, rather than a particular agency or official, is the real party to state contracts. The state should be identified as follows: This contract is between the State of North Dakota ("State") acting through its \_\_\_\_\_ [agency] and [ABC Company] ("Contractor").

Use one word descriptive terms, introduced in the opening clause identifying the parties, to refer to the parties throughout the contract. Check to be sure that references to the parties are consistent throughout the contract. An example of an acceptable paragraph identifying the parties is: "This agreement is between the State of North Dakota ("State"), acting through its Commissioner of Labor, and ABC Company ("Company")." Note that when this is done the one word descriptive term is considered a proper noun and, in most cases, no longer needs to be preceded by the definite article "the." Example: "Contractor and State will ..." rather than "The Contractor and the State will ..."

## B: SCOPE OF AGREEMENT

### Purpose

Identify the goods or services the state is purchasing.

### Goal

Describe the goods or services required under the contract in sufficient detail so that a failure of the contractor to meet the state's expectations will be a breach of contract.

## RECOMMENDED LANGUAGE

CONTRACTOR, agrees to provide the following services:

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- Note: If the description is too vague, it will be difficult for the state to enforce the contract or establish a breach of contract by the contractor.

### Alternatives and Options

Frequently, the goods or services are described in general terms in the contract itself and a more detailed description, sometimes called the “statement of work,” is attached as an exhibit to the contract and incorporated by reference.

## C: TERM OF AGREEMENT

### Purpose

Identify the time period during which the agency and contractor are subject to the contract’s commitments.

### Goal

Specify a fixed date on which the contract begins and ends, within the current biennium.

## RECOMMENDED LANGUAGE

The term of this contract is for a period of [#] months, beginning on [Month, Day], 20[Year], and ending on [Month, Day], 20[Year].

- Note: A state agency generally lacks authority to commit funds beyond the term of the current biennium. In addition, for most contracts, an agency will want to prohibit the contractor from terminating the agreement on short notice.

### Alternatives and Options

A contract may extend beyond the current biennium if the agency has express authority to enter into the contract or if the termination clause in the contract allows the agency to terminate the contract if sufficient funds are unavailable, if the law regarding the contract is changed, or without cause at any time. See **G:Termination**; and N.D.A.G. Letter to Peterson (Mar. 18, 1977).



## **D: COMPENSATION – PAYMENTS**

### **Purpose**

Identify the amount of money the state must pay pursuant to the contract.

### **Goal**

Ensure the agency is not committing more money than it has been appropriated by identifying a fixed amount of money to be paid to the contractor.

### **RECOMMENDED LANGUAGE**

STATE will pay for the services provided by CONTRACTOR under this contract an amount not to exceed \_\_\_\_\_ per \_\_\_\_\_, to be paid \_\_\_\_\_.

- Note. Contracts requiring payment for each good or hour of service should not be open-ended and should instead identify the total number of goods or hours of service being purchased.

### **Alternatives and Options**

If a total number of goods or hours of service cannot be identified, a cap should be placed on the total number, which may not be exceeded without the written consent of the agency.

### **Interest Due on Overdue Payments**

Although there is no need to include a provision governing interest in state contracts, state entities should be aware that interest must be paid on a payment due from the state if the payment is not made by the date specified in the contract or, if no date is specified, within 45 days of receipt of an invoice. N.D.C.C. § 13-01.1-02.

## **E: LANDLORD’S OBLIGATIONS**

### **Purpose**

Identify the duties owed by the landlord to the agency as a tenant.

### **Goal**

Require the landlord to fulfill all duties that the agency does not want to assume, such as payment of utilities, janitorial services, and grounds keeping.

## RECOMMENDED LANGUAGE

LANDLORD agrees:

1. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the premises.
2. To perform all required maintenance for the premises, including all janitorial services, which will be done on a daily basis, including furnishing of related supplies.
3. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants and trees on the premises.
4. That if other portions of the building are leased to other parties, LANDLORD shall not permit any activity to be conducted in other portions of the building or grounds that will materially interfere with STATE'S use and enjoyment of the premises.
5. That STATE may install items that it deems necessary for maximum and optimum utilization of the premises. STATE may, at any time, remove from the premises all fixtures and other equipment owned by STATE; provided the removal is completed by termination of this lease or any renewal or extension. STATE agrees to repair any damages that may be done to the premises resulting from the removal of the items, if any.
6. STATE may place decorations, wall hangings, signs and directories upon entrance doors, in hallways leading to its premises, or doors and walls within the premises.
7. To furnish \_\_\_\_\_ automobile parking stalls for use by STATE, its agents or designees, in the lot provided for use by the building tenants.
8. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful regulations, or orders of any duly constituted authority, present or future, affecting the premises.

### **Alternatives and Options**

Frequently, a landlord is willing to pay for some utilities, but expects the agency to pay for the utility expenses within its control such as telephone and electricity. Thus, this list is not exhaustive or required, but is merely a suggested starting point, and the agency is encouraged to review the requirements to ensure they meet its needs.

Access to parking should be considered for leases of office space.

## **F: STATE'S OBLIGATIONS**

### **Purpose**

Identify the duties owed by the agency as a tenant to the landlord.

### **Goal**

Limit the obligations of the agency as a tenant to those that the agency is willing to assume.

## **RECOMMENDED LANGUAGE**

For the term of this lease, and any renewals or extensions, STATE agrees:

1. To pay the rent when due;
2. To pay for its own telephone service;
3. To keep the premises in reasonable condition the same as at the commencement of the term or as it may be put by LANDLORD, except for reasonable use and wear, and damage by fire and unavoidable casualty;
4. Not to make any unlawful, improper, or offensive use of the premises, and to observe all the laws of the state of North Dakota and the ordinances of the city of \_\_\_\_\_ in force from time to time relating to the leased premises;
5. To permit LANDLORD at all reasonable times to enter and examine the premises and to make necessary repairs for the protection of the premises;
6. To surrender the premises to LANDLORD at the end of the term; and, in default of the payment of rent due or failure to perform its obligations under this lease, to surrender the premises upon demand made by LANDLORD; and
7. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by STATE.

### **Alternatives and Options**

A contracting agency frequently agrees to pay utility expenses within its control, such as telephone, or for services that fall within the job duties of an employee such as janitorial services or grounds keeping. Again, this list is a suggested starting point.

## **G: TERMINATION**

### **1-SERVICE CONTRACT**

#### **Purpose**

Identify the circumstances under which the contract may be cancelled prior to the termination date specified in the contract.

#### **Goal**

Ensure that the agency can cancel the contract if circumstances change that make continuing the contract inappropriate or undesirable, and limit the ability of the contractor to terminate the agreement with little or no notice to the agency.

### **RECOMMENDED LANGUAGE**

#### **a. Termination without Cause**

This contract may be terminated by mutual consent of both parties, or by either party upon 30 days written notice.

#### **b. Termination for Lack of Funding or Authority**

STATE may terminate this contract effective upon delivery of written notice to CONTRACTOR, or on any later date stated in the notice, under any of the following conditions:

1. If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term. The contract may be modified by agreement of the parties in writing to accommodate a reduction in funds.
2. If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract.
3. If any license, permit or certificate required by law or rule, or by the terms of this contract, is for any reason denied, revoked, suspended or not renewed.

Any termination of this contract under this subsection is without prejudice to any obligations or liabilities of either party already accrued prior to termination.

#### **c. Termination for Cause.**

STATE by written notice of default to CONTRACTOR may terminate the whole or any part of this contract if:

1. CONTRACTOR fails to provide services required by this contract within the time specified or any extension agreed to by STATE; or
2. CONTRACTOR fails to perform any of the other provisions of this contract, or fails to pursue the work as to endanger performance of this contract in accordance with its terms.

The rights and remedies of STATE provided in the above clause related to defaults by CONTRACTOR are not exclusive and are in addition to any other rights and remedies provided by law or under this contract.

## **Concern**

The agency should not be forced to breach the contract if the agency's governing law or spending authority is changed in a way that prevents the agency from fulfilling its obligations under the contract. An agency's ability to cancel the contract should be without a penalty.

## **Alternatives and Options**

A clause permitting the agency to terminate the agreement without cause upon a short period of advance notice to the contractor, such as 30 days, provides good protection from unforeseen changes. If a contractor is not willing to grant such broad permission to terminate the contract, the agency could propose a **Termination for Convenience clause**.

## **RECOMMENDED LANGUAGE**

### **d. Termination for Convenience**

The agency may terminate this Agreement in whole or in part when the agency has determined that continuation of the Agreement is no longer necessary or would not produce beneficial results commensurate with the further expenditure of public funds.

If a contractor is not willing to agree to this alternative language, clauses authorizing the termination if the agency's governing law or spending authority is changed will still be helpful.

Termination should also be permitted without penalty if the contractor breaches the contract or if a license or permit required for the contractor to provide the goods or services is denied, revoked, or not renewed.

Personal service contracts frequently allow for termination by mutual consent and by either party on a short period of prior written notice to the other party.

- An agency may wish to give a contractor an opportunity to cure before terminating the agreement. If it does, the language recommended above in c(2) should be changed as follows:

## ALTERNATIVE RECOMMENDED LANGUAGE

### **c. Termination for Cause.**

1. ...
2. CONTRACTOR fails to perform any of the other provisions of this contract, or so fails to pursue the work as to endanger performance of the contract in accordance with its terms, and after receipt of written notice from STATE, fails to correct the failures within ten days or a longer period as STATE may authorize.

## 2-LEASE

### **Purpose**

Identify the circumstances under which a lease may be terminated prior to that end date specified in the lease.

### **Goal**

Ensure that the agency can cancel the lease if circumstances change that make continuing the lease inappropriate or undesirable, and limit the ability of the landlord to terminate the lease with little or no notice to the agency.

## RECOMMENDED LANGUAGE

### **a. Termination of Lease**

STATE has no obligation under this lease for the initial or succeeding terms if the North Dakota Legislature fails to appropriate to STATE sufficient funds to defray the full rental costs. STATE, without any liability, may terminate this lease by providing 30 days written notice, if its legislative appropriations are reduced or if its authority to spend its appropriations is reduced or limited by law or by reductions in federal or other grant funds to a point STATE, in its sole discretion, deems insufficient to pay the full rental cost for the remainder of the term of this lease. During the term of this lease or any renewal or extension, STATE may terminate this lease by providing 30 days written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this lease, or if STATE determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rules.

### **b. Termination of Lease in the Event of Destruction of Premises**

If the leased premises are destroyed or damaged by fire or the elements to the extent they become untenable, then this lease will terminate immediately, unless LANDLORD, within 20 days of the happening of the event, gives written notice of intention to restore the building and fully restores the premises within a reasonable time. During the term between destruction and restoration of the premises rent will not be due.

### **Concern**

The agency should not be forced to breach the contract if the agency's governing law or spending authority is changed in a way that prevents the agency from fulfilling its obligations under the lease, if the property is not compliant with the Americans with Disabilities act, or if the property is destroyed. An agency's ability to cancel the lease should be without a penalty.

### **Alternatives and Options**

**All leases must be approved by facility management.** These provisions are very important. An agency should be reluctant to consider alternatives. The procedure for completing a state office lease may be found at:

<http://www.state.nd.us/fac/forms/leaseprocedure.htm>.

## **H: DELAY OR DEFAULT FORCE MAJEURE**

### **Purpose**

Identify the obligations of the contractor and expectations of the agency if timely performance of the contract is impossible or extremely difficult for reasons beyond the contractor's control.

### **Goal**

Balance the contractor's difficulties under the circumstances with the agency's need for the goods or services.

### **RECOMMENDED LANGUAGE**

CONTRACTOR shall not be held responsible for delay or default caused by fire, flood, riot, acts of God or war if the event is beyond CONTRACTOR'S reasonable control and CONTRACTOR gives notice to STATE immediately upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

## **Alternatives and Options**

Immediate termination is an option, but an agency generally should consider giving a contractor a grace period to resume providing services or goods before terminating the agreement and finding a new contractor.

## **I: RENEWAL**

### **Purpose**

Indicate whether the contract may be renewed by the parties for one or more additional time periods.

### **Goal**

Give the agency the choice of continuing the contract for an additional period of time.

### **RECOMMENDED LANGUAGE**

This contract will not automatically renew. STATE will provide written notice to CONTRACTOR of its intent to renew this contract at least 60 days before the scheduled termination date.

### **Concern**

Continuing an existing contract can spare the agency time, but the agency also loses the opportunity to go through a competitive procurement process and obtain similar or better services or goods at similar or better prices.

## **Alternatives and Options**

Automatic renewals should be avoided unless the agency can terminate the contract on short notice without cause. Renewing the agreement should require a written notification from the agency to the contractor.

## **J: HOLDING OVER (LEASES)**

### **Purpose**

Indicate what happens if the state remains in possession of the leased premises after the end of the lease term.



**Goal**

Allow the agency to retain possession on a short term basis under the same lease terms.

**RECOMMENDED LANGUAGE**

If STATE remains in possession of the premises after the lease expires, and LANDLORD accepts rent from it, the lease will be deemed renewed month to month.

**Concern**

Avoid the application of N.D.C.C. § 47-16-06, which may require an automatic extension for up to a year.

**Alternatives and Options**

An agency should be reluctant to consider alternatives to this language.

**K: MERGER AND MODIFICATION****Purpose**

Make sure the written contract supersedes any prior written or verbal negotiations and explain how the contract may be amended.

**Goal**

Confirm that the provisions of the contract supersede any prior oral negotiations and prevent subsequent unwritten communications from being considered amendments to the contract.

**RECOMMENDED LANGUAGE**

This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

**L: SEVERABILITY****Purpose**

Explain what happens if one of the provisions in the contract is declared illegal.

**Goal**

Allow the remaining terms of the contract to continue to apply to the parties, if performance of the contract without the illegal clause is possible.

**RECOMMENDED LANGUAGE**

If any term of this contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms will not be affected and, if possible, the rights and obligations of the parties are to be construed and enforced as if the contract did not contain that term.

**Alternatives and Options**

Termination of the entire contract is an option; however, this may result in an undesirable interruption of the provision of goods or services to the agency and require a new procurement process.

**M: ASSIGNMENT AND SUBCONTRACTS****Purpose**

Identify the obligations of the contractor under the agreement that may be assigned (transferred) or delegated to another person.

**Goal**

Allow the agency to maintain control over its choice of the person to provide goods or services under the contract.

**RECOMMENDED LANGUAGE**

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE'S express written consent. However, CONTRACTOR may enter into subcontracts provided that any subcontract acknowledges the binding nature of this contract and incorporates this contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor. CONTRACTOR shall not have the authority to contract for or incur obligations on behalf of STATE.

**Concern**

One of the purposes of the procurement process is defeated if a contract is awarded based on the qualifications of the contractor, but the contractor

delegates or transfers those duties to another person who may lack those qualifications.

## **Alternatives and Options**

There may be times when assignment or subcontracts are appropriate. Therefore, an agency can permit assignment, but should require the contractor to obtain the agency's consent before the assignment. For subcontracts, the consent of the agency can be omitted as a requirement but the contract should provide that the contractor remains responsible for the acts of any subcontractors.

## **N: NOTICE**

### **Purpose**

Identify the representative of each contracting party to whom notices required under the contract must be provided.

### **Goal**

Select one person for the agency to work with and contact regarding the contract.

## **RECOMMENDED LANGUAGE**

All notices or other communications required under this contract must be given by registered or certified mail and are complete on the date mailed when addressed to the parties at the following addresses:

\_\_\_\_\_  
\_\_\_\_\_

## **ALTERNATIVE RECOMMENDED LANGUAGE**

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

## **O: APPLICABLE LAW AND VENUE**

### **Purpose**

Identify the law governing the contract and the court or courts in which contract disputes may be heard.

## **Goal**

Have the contract interpreted according to North Dakota law and any dispute resolved in North Dakota state courts.

## **RECOMMENDED LANGUAGE**

This contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this contract must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota.

## **Concern**

Absent legislative authority, an agency may not agree to submit to the jurisdiction of the federal courts. N.D. Const. art. I, § 9. If an agency were to agree to federal court jurisdiction, the states 11th Amendment immunity may be waived. Generally, the federal courts lack jurisdiction because a state is not considered a citizen for purposes of diversity jurisdiction.

The Attorney General's office generally discourages state agencies from agreeing to have contracts interpreted by or to be subject to the jurisdiction of another state's courts. **Before agreeing to such a provision**, the agency should consult with its attorney and analyze the risks involved. The agency and its attorney may be completely unfamiliar with the laws of another state. The cost of travel to the other state and hiring an attorney licensed in that state are also concerns the agency should consider.

## **Alternatives and Options**

If the contractor is unwilling to agree to be bound by North Dakota law or to be subject to the jurisdiction of North Dakota courts, an agency should propose removing any reference to choice of law or venue in the contract. General choice of law principles would then determine the appropriate governing law and jurisdiction for contract disputes.

## **P: SPOLIATION**

### **Purpose**

Identify responsibility for controlling the scene of an accident or potential claim and for preserving any relevant evidence of the circumstances surrounding the accident or potential claim.

**Goal**

Have the contractor be responsible for preventing spoliation (destruction or severe modification of evidence), particularly when the scene of an accident or claim is beyond the state's control.

**RECOMMENDED LANGUAGE**

CONTRACTOR (or LANDLORD) agrees to promptly notify STATE of all potential claims that arise or result from this agreement. CONTRACTOR (or LANDLORD) further agrees to take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a claim, while maintaining public safety, and to grant to STATE the opportunity to review and inspect the evidence, including the scene of the accident.

**Concern**

Determining the cause of an accident is important for future loss prevention and for determining responsibility for an accident. Spoliation can interfere with proper investigation of an accident, jeopardize or nullify applicable insurance coverage, and even result in a separate lawsuit against the party responsible for the spoliation.

Controlling the scene of an accident and preservation of evidence should not take priority over public safety.

**Alternatives and Options**

A similar clause may be used in service contracts as well as leases. This clause is not required by law and may be omitted when services are provided in locations that are under the state's control.

For further information on spoliation, consult the Risk Management Manual of the Risk Management Division of OMB. The manual can be found at:

<http://www.nd.gov/risk/publications/manual.html>.

**Q: LIQUIDATED DAMAGES****Purpose**

A liquidated damages clause determines in advance the amount of damages if a party breaches the agreement.

## **Goal**

To compensate a party for losses caused by the other party's breach, which losses are reasonably foreseeable but difficult to precisely determine.

## **Concern**

Contracts may not include a penalty for nonperformance. N.D.C.C. § 9-08-03. Contracts may not include a liquidated damages provision that fixes the amount of damages in the event of nonperformance unless three facts exist:

1. at the time the contract was made, the damages in the event of nonperformance would be difficult to accurately estimate;
2. there was a reasonable effort by the parties to fix their compensation under the contract; and
3. the amount of liquidated damages set by the parties is reasonable and not disproportionate to the damages reasonably to be anticipated.

N.D.C.C. § 9-08-04, *Eddy v. Lee*, 312 N.W. 2d 326 (N.D. 1981). These requirements are more liberally applied in public contracts.

**Liquidated damages provisions that may be enforced against the state are strongly discouraged.** A state agency must have the ability to terminate agreements not only for cause or mutual consent, but also if funding is reduced or for another legitimate reason without incurring additional liability.

## **RECOMMENDED LANGUAGE**

**None. An agency should discuss proposed liquidated damage clauses with the agency's attorney.**

# **R: INDEMNITY AND LIMITATIONS OF LIABILITIES**

## **Purpose**

Allocate responsibility for risks of liability and costs of legal defense that may arise out of the agreement.

## **Goal**

Ensure that the party that exercises control over the activities governed by the contract, and is therefore in the best position to implement safety and loss control practices, retains as much risk of liability and costs of legal defense as is commercially reasonable.

## RECOMMENDED LANGUAGE

The Risk Management Division of the Office of Management and Budget has written sample indemnity and limitation of liability language that should be used in each contract with the state. Depending upon the type of contract, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division, and determine, which clause is best suited for your particular situation. Please review the risk management manual available at: <http://www.nd.gov/risk/publications/manual.html>.

### **N.D.C.C. § 32-12.2-15**

Agencies may be asked to agree to limit the liability of a contractor. Section 32 12.2 15 of the North Dakota Century Code was passed in the 2005 legislative session. It provides that contracts for the purchase or lease of software, communications, or electronic equipment may include terms that limit the liability of a contractor to the state if the Attorney General and the director of OMB agree that it is in the state's best interest. Absent this written approval, or specific statutory authority, an agency may not limit the liability of a contractor to the state.

A committee reviews these requests to limit the liability of a contractor to the State by the terms of a contract with a state agency. Agencies should bear in mind that making such a request to this committee should be a last resort. It is generally in the best interest of the state to remove the indemnity language. By law, the committee may only approve requests to limit the liability of a contractor if it is in the best interest of the state, and this is rarely the case. Please work with your assistant attorney general or special assistant attorney general to assist you in removing any requirement that the state contractually limit the liability of a contractor.

- This manual does not offer a sample clause for an agency to use to limit the liability of a contractor or third party because these clauses should not be used without the specific advice of the agency's attorney.

Other than those contracts approved under the process outlined in N.D.C.C. § 32-12.2-15, the Risk Management Fund will not cover claims against the state that arise by an indemnity or limitation of liability provision included in a state contract. See N.D.C.C. ch. 32-12.2.

For further information on indemnity and limitations of liability, consult the Risk Management Manual at: <http://www.nd.gov/risk/publications/manual.html>.

## **S: INSURANCE**

### **Purpose**

Identify the types and amounts of insurance coverage that will be maintained by the parties to the contract.

### **Goal**

Ensure sufficient insurance coverage is in place to cover all claims against the contractor, and to cover any claims and costs of defense of the state that the contractor is obligated to pay. Different types of insurance cover different types of claims. The insurance coverage required by a contract needs to cover the types of claims which may arise under that specific contract.

## **RECOMMENDED LANGUAGE**

### **Required Coverages**

The Risk Management Division of the Office of Management and Budget has written sample insurance language that should be used in each contract with the state. Depending upon the type of contract, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division, and determine, which clause is best suited for your particular situation. Please review Section 5 of the Risk Management Manual, available at: <http://www.nd.gov/risk/publications/manual.html>.

### **Alternatives and Options**

Professional liability insurance and employer's liability ("stop gap") insurance may not be appropriate for certain contracts. All contractors should be expected to maintain a commercially reasonable level of insurance coverage.

An agency should assess whether the insurance limits recommended above are sufficient. In making this assessment, keep in mind that the limits will protect both the state and the contractor. In addition, the risks of liability in a particular contract may be much larger than the value of the contract. A defective part with a value less than one dollar may nevertheless result in a product failure causing thousands of dollars of damage.

The most common alternative is to omit the requirement that the state be named as an additional insured. However, agencies should be aware of the significant decrease this causes in the state's protection from liability. The insurance coverage, without an additional insured endorsement, will generally cover claims against the contractor but disregard claims against the state. This will require the



state to seek indemnity from the contractor personally, but the contractor may have insufficient assets to fulfill the contractor's duty to indemnify the state.

For further information on insurance requirement or insurance coverage, consult the Risk Management Manual.

## **Concern**

The benefit of requiring a contractor to indemnify the state or have certain levels of insurance coverage, or both, can be easily neutralized if the details of the contractor's insurance policy are written in a way to effectively exclude from coverage the very claims the state wants to be covered by the policy. For example, an insurance policy offers little protection if it is offered by an insolvent insurer or if the policy has an unusually high deductible.

The recommended insurance provisions are designed to ensure that the contractor's insurance policies have certain minimum characteristics. The most important requirement is that the state be named as an additional insured under the contractor's insurance policies. This extends to the state the same protection from liability that the contractor enjoys.

## **Alternatives and Options**

The most common alternative is to omit the requirement that the state be named as an additional insured. However, agencies should be aware of the significant decrease this causes in the state's protection from liability. The insurance coverage, without an additional insured endorsement, will generally cover claims against the contractor but disregard claims against the state. This will require the state to seek indemnity from the contractor personally, but the contractor may have insufficient assets to fulfill the contractor's duty to indemnify the state.

For further information consult the Risk Management Manual at: <http://www.nd.gov/risk/publications/manual.html>.

# **T: ATTORNEY FEES AND COSTS**

## **Purpose**

Allocate responsibility for paying attorneys fees and costs incurred by a prevailing party in litigation to enforce a contract.

## **Goal**

Recoup the state's legal expenses in suing the contractor to enforce the contractor's contractual responsibilities.

## RECOMMENDED LANGUAGE

In the event a lawsuit is instituted by STATE to obtain performance due of any kind under this contract, and STATE is the prevailing party, CONTRACTOR shall, except when prohibited by N.D.C.C. § 28-26-04, pay STATE'S reasonable attorney fees and costs in connection with the lawsuit.

### Concern

A reciprocal provision in favor of the contractor should be avoided. **This type of expense would not be covered by the North Dakota Risk Management Fund and could only be paid pursuant to an appropriation.**

## U: ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

### Purpose

Address whether the parties will resort to alternative methods of resolving a dispute.

### Goal

Authorize alternative dispute resolution as a voluntary method of resolving disputes, but not bind the state to a non judicial decision that is inconsistent with state law.

## RECOMMENDED LANGUAGE

**STATE does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.**

### Alternatives and Options

Alternative dispute resolution may be helpful and a cost effective alternative to litigation. However, unless there is a specifically applicable statute, an agency has questionable legal authority to waive the state's right to have disputes resolved in a court. Alternative dispute resolution should be voluntary, so the agency can choose to go to court if the parties cannot reach a settlement that is authorized by law.

- This clause may be deleted without affecting an agency's authority to informally settle a dispute with a contractor. However, the agency should still ensure it is not **required** to submit to alternative dispute resolution.

## **V: CONFIDENTIALITY**

### **Purpose**

Explain the obligations of the parties in maintaining, releasing, and discarding information that is confidential.

### **Goal**

Fulfill the objectives of the contract while ensuring that the parties maintain the confidentiality of information that is being shared to the extent permitted by law.

### **RECOMMENDED LANGUAGE**

CONTRACTOR agrees not to use or disclose any information it receives from STATE under this contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this contract or as authorized in advance by STATE. STATE agrees not to disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota open records law, N.D.C.C. § 44-04-18. The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the term of this contract, or any extensions or renewals of it.

### **Alternatives and Options**

The parties must follow applicable confidentiality laws even if the clause is omitted. However, the notification process in the proposed clause ensures that the party receiving the information is advised that the information is confidential.

Contractors frequently ask a contracting agency to keep all information provided by a contractor confidential. The open records law does not allow an agency to deny a request for records unless the records are closed or confidential under a specific law. Accordingly, a state agency must not agree to keep records confidential that are subject to the open records law. Further information regarding open records and meetings may be found at: <http://www.ag.nd.gov/OpenRecords/ORM.htm>.

## **W: COMPLIANCE WITH PUBLIC RECORDS LAW**

### **Purpose**

Address the requirements of the parties to release records upon request under the state open records law.

### **Goal**

Notify the contractor that the contractor may, depending on the circumstances, be subject to the state open records law as a result of the contract and advise the contractor of its responsibilities under the open records law.

## **RECOMMENDED LANGUAGE**

CONTRACTOR understands that, except for disclosures prohibited in this agreement, STATE must disclose to the public upon request any records it receives from CONTRACTOR. CONTRACTOR further understands that any records that are obtained or generated by CONTRACTOR under this contract, except for records that are confidential under this agreement, may, under certain circumstances, be open to the public upon request under the North Dakota open records law. CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the open records law and to comply with STATE'S instructions on how to respond to the request.

### **Alternatives and Options**

The parties must comply with the open records laws even if this clause is omitted. Including this clause in the contract will put contractors on notice regarding the requirements of the open records laws and prevent misunderstandings about how the law may apply to certain records. Further information regarding open records and meetings may be found at: <http://www.ag.nd.gov/OpenRecords/ORM.htm>.

## **X: WORK PRODUCT, EQUIPMENT, AND MATERIALS**

### **Purpose**

Establish ownership of work product, materials, and equipment purchased or created under the contract.

### **Goal**

Get full value for the amount of public funds expended to purchase or create documents, materials, or equipment under the contract.

## RECOMMENDED LANGUAGE

All work product, equipment or materials created or purchased under this contract belong to STATE and must be delivered to STATE at STATE'S request upon termination of this contract. CONTRACTOR agrees that all materials prepared under this contract are "works for hire" within the meaning of the copyright laws of the United States and assigns to STATE all rights and interests CONTRACTOR may have in the materials it prepares under this contract, including any right to derivative use of the material. CONTRACTOR shall execute all necessary documents to enable STATE to protect its rights under this section.

### **Alternatives and Options**

If a contractor is allowed to retain valuable property that was purchased or created at state expense, the agency should determine whether the contract price should be adjusted to reflect the value retained by the contractor. For more information see: <http://www.copyright.gov/circs/circ09.pdf>.

## **Y: INDEPENDENT ENTITY**

### **Purpose**

Clarify that a contractor is not acting as a state employee in performing the contract.

### **Goal**

Indicate that the contractor retains sufficient control and discretion over carrying out the activities in the contract that the contractor will not be considered a state employee.

## RECOMMENDED LANGUAGE

CONTRACTOR is an independent entity under this contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR'S activities and responsibilities under this contract, except to the extent specified in this contract.

### **Alternatives and Options**

This clause may be omitted, but a state agency must be careful not to exercise a sufficient degree of control over a contractor for the contractor to be considered a state employee. Otherwise, the state will be required to deduct certain amounts

from payments to the contractor and comply with other laws governing employer employee relationships.

## **Z: NONDISCRIMINATION – COMPLIANCE WITH LAWS**

### **Purpose**

Maintain compliance with existing laws.

### **Goal**

It undermines the public's confidence in its government if contractors for the state are allowed to discriminate or violate the laws that other members of the public are expected to follow.

### **RECOMMENDED LANGUAGE**

CONTRACTOR agrees to comply with all applicable laws, rules, and policies, including those relating to nondiscrimination, accessibility and civil rights. CONTRACTOR agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes, unemployment compensation, and workers' compensation premiums. CONTRACTOR will have and keep current at all times during the term of this contract all required licenses and permits.

### **Alternatives and Options**

**This clause may be omitted, but including the clause ensures that violating applicable laws is also a breach of the contract warranting termination.**

## **AA: STATE AUDIT**

### **Purpose**

Address the audit requirements that will apply to the contractor.

### **Goal**

Preserve access by the state auditor to all records of the contractor regarding the contract. See N.D.C.C. § 54-10-19.

## RECOMMENDED LANGUAGE

All records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this contract are subject to examination by the North Dakota State Auditor or the Auditor's designee. CONTRACTOR will maintain all of these records for at least three years following completion of this contract.

### **Alternatives and Options**

This clause helps advise contractors that their records regarding the contract may be audited by the state auditor as well as the contractor's own accountants.

## **BB: PREPAYMENT**

### **Purpose**

Indicate that payment will be made after services are received.

### **Goal**

Avoid the requirement of paying for goods or services before they are received by the state and determined to be sufficient under the contract.

## RECOMMENDED LANGUAGE

STATE will not make any advance payments before performance by CONTRACTOR under this contract.

### **Alternatives and Options**

The clause may be omitted. However, this office and the State Auditor discourage the use of prepaying provisions. An agency should not only avoid paying public funds before verifying the quality or sufficiency of the goods or services being purchased, but should reconsider doing business with a contractor whose financial condition is so marginal that it needs an infusion of cash in order to proceed with the project. An agency should strongly consider requiring the contractor to post a performance bond if the contractor requires a prepayment.

## **CC: TAXPAYER ID**

### **Purpose**

Obtain necessary information from the contractor.

**Goal**

Eliminating the need to obtain a contractor's identification number after the contract is executed to complete mandatory tax filings.

**RECOMMENDED LANGUAGE**

CONTRACTOR'S federal employer ID number is: \_\_\_\_\_.

**Alternatives and Options**

The clause may be omitted, but the agency will nevertheless be required in many instances to obtain the identification number for mandatory tax filings prior to paying funds to the contractor.

**DD: EFFECTIVENESS OF AGREEMENT****Purpose**

Specify an effective date of the agreement.

**Goal**

Avoid having the parties rely on the agreement until it is signed by all necessary parties.

**RECOMMENDED LANGUAGE**

This contract is not effective until fully executed by both parties.

**Alternatives and Options**

This clause may be omitted, but a contractor or third party may claim that an agreement is effective even before it is signed by all required parties.

**EE: SIGNATURES****Purpose**

The signatures on the contract should match the parties identified in the introduction to the contract. When contracting with a corporation or business, the person who signs the agreement should be an officer or other person with authority to act for the corporation or business. If the person is not an officer with apparent authority, insist on a board resolution, power of attorney from an officer,



or some documentation showing that the person is authorized to act on behalf of the corporation or business.

## **Goal**

All signatures must be dated and written in ink, preferably in color for easy identification of an original signature. The official title or position of the individuals executing the contract should appear below each signature line. For leases and other contracts with a party who does not sign the contract in front of an employee of the agency, the signature should be notarized.

## **Alternatives and Options**

Electronic signatures are provided for in N.D.C.C. ch. 9 16. However, there are currently no guidelines for their use by a state agency. Accordingly, an agency considering using an electronic signature should consult its attorney if a contractor asks it to accept an electronic signature.

## **APPENDIX**

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**A – CHECK LISTS**

**B – SAMPLE FORMS**

# CONTRACT CHECKLIST

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- ☐ 1. Does the state agency or official have the authority to enter into the contract?
  - ☐ a. Have sufficient funds been budgeted?
- ☐ 2. Does the other party have the authority to enter into the contract?
- ☐ 3. Has the proposed contract been reviewed by the agency's assistant attorney general or special assistant attorney general?
- ☐ 4. Is the contract in writing with all pages numbered?
  - ☐ If there are any exhibits or attachments referred to in the contract, are all the documents attached?
- ☐ 5. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
- ☐ 6. Are there any handwritten changes or other alterations to the contract?
  - ☐ If so, have all the changes or alterations been initialed by all signers?
- ☐ 7. Are the parties identified in the introductory paragraph or first clause?
  - ☐ Except for contracts between state agencies, the state, rather than a particular agency or official, is the real party to state contracts. The state should be identified as follows: This contract is between the State of North Dakota ("State") acting through its \_\_\_\_\_ [agency] and [ABC Company] ("Contractor").
- ☐ 8. Has the agreement been checked for the following ambiguities and inconsistencies:
  - ☐ If recitals are used, are they unambiguous and consistent with the terms of the contract?
  - ☐ Are all references to parties, exhibits and other things internally consistent?
- ☐ 9. Are all terms unambiguous or clearly defined?
  - ☐ Is the contract written in plain English using the present tense and the active voice?
  - ☐ Are the terms "shall," "may," and "must" used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
  - ☐ Is the connective "and" used properly in the conjunctive?
  - ☐ Is "or" used properly in the disjunctive?
  - ☐ Is it clear to what any modifier or dependent clause refers?
  - ☐ Where particulars are listed, is it clear whether the list is exhaustive?
- ☐ 10. If the contract contains a "liquidated damages" provision, are damages otherwise difficult to estimate in the event of a breach?
- ☐ 11. Are signatures dated and written in colored ink?
- ☐ 12. Is the name and title or position of each person signing the document listed below the signature line?

- Do all signatures match the typed or printed names?
- ☐ 13. If contracting with a corporation:
  - has at least one officer of the corporation signed the document?
  - If contracting with a corporation, and if the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- ☐ 14. Does the contract specify both the date on which it begins and the date on which it ends?
- ☐ 15. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term, a provision terminating the contract without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
- ☐ 16. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- ☐ 17. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed as required by law?
- ☐ 18. Does the document include clauses regarding:
  - a. Force majeure – Delay or Default;
  - b. Applicable law;
  - c. Merger;
  - d. Assignment and delegation;
  - e. Subcontracting;
  - f. Modification;
  - g. Nondiscrimination and compliance with laws;
  - h. Severability;
  - i. Attorneys fees;
  - j. Notices;
  - k. Ownership of work product, equipment, or materials;
  - l. Spoliation; and
  - m. Tax identification number.
- ☐ 19. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
- ☐ 20. Is approval needed from the Attorney General and the director of the OMB?
- ☐ 21. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
  - a. Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

# LEASE CHECKLIST

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- ☐ 1. Have OMB and the Office of Attorney General approved the lease?
- ☐ 2. Does the lease adequately describe the premises?
- ☐ 3. Is the lease term limited to the current biennium? If the lease continues for longer than current biennium, are there sufficient funds appropriated to pay the rent as it is due?
- ☐ 4. If a lease requires expenditure of state funds beyond the current biennium, is there express authority and funding for a longer term, a provision terminating the lease without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
- ☐ 5. Regardless of the specified term of the lease, does the lease include an acceptable termination clause permitting the state to terminate the lease at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- ☐ 6. Are the terms and amount of payment stated and correctly calculated?
  - o a. If based on square footage, is the square footage also stated?
- ☐ 7. Is the responsibility for utilities, repairs and maintenance, janitorial service, snow removal, etc. clearly stated?
  - o a. Is there a clause governing availability of parking?
  - o b. Is the landlord's responsibility for fire or other insurance stated?
  - o c. Is there a clause governing events of damage or destruction to property?
- ☐ 8. Is there a clause concerning accessibility requirements and compliance with ADA?
- ☐ 9. Is the lease in writing with all pages numbered?
  - o If there are any exhibits or attachments referred to in the lease, are all the documents attached?
- ☐ 10. Are the parties identified in the introductory paragraph or first clause?
- ☐ 11. Are signature dated and written in colored ink?
- ☐ 12. Is the name and title of position of each person signing the lease listed below the signature line?
  - o Do all the signatures match the typed or printed names?
- ☐ 13. If leasing from a corporation:
  - o has at least one officer of the corporation signed the document?
  - o if leasing from a corporation, and if the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- ☐ 14. Does the lease specify both the date on which it begins and the date on which it ends?

- ☐ 15. Can the state terminate the lease if it is unable to fulfill any term of the lease, or if the landlord fails to fulfill its obligations under the lease, or if the state determines it must relocate to comply with the Americans with Disabilities Act of 1990 or any rules adopted under the Act, or with any other state or federal laws or rules?
- ☐ 16. Does the document include clauses regarding:
  - a. Force majeure – Delay or Default;
  - b. Applicable law;
  - c. Merger;
  - d. Assignment and delegation;
  - e. Subcontracting;
  - f. Modification;
  - g. Nondiscrimination and compliance with laws;
  - h. Severability;
  - i. Attorneys fees;
  - j. Notices;
  - k. Ownership of work product, equipment, or materials;
  - l. Spoliation; and
  - m. Tax identification number.
- ☐ 17. Is there an acceptable indemnification and hold harmless provision indicating how risks arising from the lease are assigned among the parties?
- ☐ 18. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
  - a. Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

# JOINT POWERS AGREEMENT CHECKLIST

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- ☐ 1. Are the parties to the agreement and its purpose clearly stated?
- ☐ 2. Is the purpose of the agreement one which state law authorizes to be carried out through a joint powers agreement?
- ☐ 3. Does one of the parties to the agreement possess the power or function to be jointly or cooperatively exercised?
- ☐ 4. Does each state agency or official have the authority to enter into the agreement?
  - ☐ a. Have sufficient funds been budgeted?
- ☐ 5. Is the agreement in writing with all pages numbered?
  - ☐ If there are any exhibits or attachments referred to in the agreement, are all the documents attached?
- ☐ 6. Are there any handwritten changes or other alterations to the agreement?
  - ☐ If so, have all the changes or alterations been initialed by all signers?
- ☐ 7. Are the parties identified in the introductory paragraph or first clause?
- ☐ 8. Has the agreement been checked for the following ambiguities and inconsistencies:
  - ☐ If recitals are used, are they unambiguous and consistent with the terms of the agreement?
  - ☐ Are all references to parties, exhibits and other things internally consistent?
- ☐ 9. Are all terms unambiguous or clearly defined?
  - ☐ Is the agreement written in plain English using the present tense and the active voice?
  - ☐ Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
  - ☐ Is the connective “and” used properly in the conjunctive?
  - ☐ Is “or” used properly in the disjunctive?
  - ☐ Is it clear to what any modifier or dependent clause refers?
  - ☐ Where particulars are listed, is it clear whether the list is exhaustive?
- ☐ 11. Are signatures dated and written in colored ink?
- ☐ 12. Is the name and title or position of each person signing the document listed below the signature line?
  - ☐ Do all signatures match the typed or printed names?
- ☐ 14. Does the agreement specify both the date on which it begins and the date on which it ends?
- ☐ 16. Regardless of the specified term of the agreement, does the agreement include an acceptable termination clause permitting either party to terminate at an earlier date without incurring additional liability if adequate funds are not appropriated or available?

- ☐ 19. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the agreement are assigned among the parties?
- ☐ 20. Is approval needed from the Attorney General?
- ☐ 21. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
  - ☐ a. Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?
- ☐ 22. Are all applicable provisions of N.D.C.C. § 54-40.3-01(1)(a-i) addressed?

54-40.3-01. Joint powers agreements - General authority.

1. Any county, city, township, city park district, school district, or other political subdivision of this state, upon approval of its respective governing body, may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them. Any political subdivision of this state may enter into a joint powers agreement with a political subdivision of another state or political subdivision of a Canadian province if the power or function to be jointly administered is a power or function authorized by the laws of this state for a political subdivision of this state and is authorized by the laws of the other state or province. A joint powers agreement may provide for:

- a. The purpose of the agreement or the power or function to be exercised or carried out.
- b. The duration of the agreement and the permissible method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of any property upon the partial or complete termination.
- c. The precise organization, composition, and nature of any separate administrative or legal entity, including an administrator or a joint board, committee, or joint service council or network, responsible for administering the cooperative or joint undertaking. Two or more political subdivisions which enter into a number of joint powers agreements may provide a master administrative structure for the joint administration of any number of those agreements, rather than creating separate administrative structures for each agreement. However, no essential legislative powers, taxing authority, or eminent domain power may be delegated by an agreement to a separate administrative or legal entity.
- d. The manner in which the parties to the agreement will finance the cooperative or joint undertaking and establish and maintain a budget for that undertaking. The parties to the agreement may expend funds pursuant to the agreement, use unexpended balances of their respective current funds, enter into a lease-option to buy and contract for deed agreements between themselves and with private parties, accumulate funds from year to year for the provision of services and facilities, and otherwise share or contribute property in accordance with the agreement in cooperatively or jointly exercising or carrying out the power or function. The agreement may include the provision of personnel, equipment, or property of one or more of the parties to the agreement that may be used instead of other financial support.
- e. The manner of acquiring, holding, or disposing of real and personal property used in the cooperative or joint undertaking.
- f. The acceptance of gifts, grants, or other assistance and the manner in which those gifts, grants, or assistance may be used for the purposes set forth in the



agreement.

g. The process to apply for federal or state aid, or funds from other public and private sources, to the parties for furthering the purposes of the agreement.

h. The manner of responding for any liability that might be incurred through performance of the agreement and insuring against that liability.

i. Any other necessary and proper matters agreed upon by the parties to the agreement.

# CONSTRUCTION CONTRACT CHECKLIST

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- ☐ 1. Have all required bonds been provided in a legally enforceable form?
  - ☐ a. If required, is a proper performance bond attached?
- ☐ 2. Are the terms of the bond adequate to guarantee all payments required by the terms of the contract?
- ☐ 3. Does the bond guarantee payment of interest on bills and claims not paid within 90 days?
- ☐ 4. Does the bond include a guarantee of payment of workers' compensation premiums?
- ☐ 5. Have all necessary licenses and permits been verified?
- ☐ 6. Are copies of the contractor's license or renewal certificate and contractor's bond attached?
- ☐ 7. Has a certificate been filed with the state by the contractor showing payment of state taxes?
- ☐ 8. Unless prohibited by law, does the contract include clauses requiring preference for North Dakota residents, with first preference given to veterans, and for materials produced in the state?
- ☐ 9. Does the state agency or official have the authority to enter into the contract?
  - ☐ a. Have sufficient funds been budgeted?
- ☐ 10. Does the other party have the authority to enter into the contract?
- ☐ 11. Has the proposed contract been reviewed by the agency's assistant attorney general or special assistant attorney general?
- ☐ 12. Is the contract in writing with all pages numbered?
  - ☐ If there are any exhibits or attachments referred to in the contract, are all the documents attached?
- ☐ 13. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
- ☐ 14. Are there any handwritten changes or other alterations to the contract?
  - ☐ If so, have all the changes or alterations been initialed by all signers?
- ☐ 15. Are the parties identified in the introductory paragraph or first clause?
- ☐ 16. Has the agreement been checked for the following ambiguities and inconsistencies:
  - ☐ If recitals are used, are they unambiguous and consistent with the terms of the contract?
  - ☐ Are all references to parties, exhibits and other things internally consistent?
- ☐ 17. Are all terms unambiguous or clearly defined?
  - ☐ Is the contract written in plain English using the present tense and the active voice?

- Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
- Is the connective “and” used properly in the conjunctive?
- Is “or” used properly in the disjunctive?
- Is it clear to what any modifier or dependent clause refers?
- Where particulars are listed, is it clear whether the list is exhaustive?
- ☐ 18. If the contract contains a “liquidated damages” provision, are damages otherwise difficult to estimate in the event of a breach?
- ☐ 19. Are signatures dated and written in colored ink?
- ☐ 20. Is the name and title or position of each person signing the document listed below the signature line?
  - Do all signatures match the typed or printed names?
- ☐ 21. If contracting with a corporation:
  - has at least one officer of the corporation signed the document?
  - If contracting with a corporation, and if the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- ☐ 22. Does the contract specify both the date on which it begins and the date on which it ends?
- ☐ 23. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term, a provision terminating the contract without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
- ☐ 24. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- ☐ 25. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed, bonded, or permitted as required by law or otherwise noncompliant with the law?
- ☐ 26. Does the document include clauses regarding:
  - a. Force majeure – Delay or Default;
  - b. Applicable law;
  - c. Merger;
  - d. Assignment and delegation;
  - e. Subcontracting;
  - f. Modification;
  - g. Nondiscrimination and compliance with laws;
  - h. Severability;
  - i. Attorneys fees;
  - j. Notices;
  - k. Spoliation; and

- I. Tax identification number.
- ☐ 27. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
- ☐ 28. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
  - a. Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

# PERSONAL SERVICE CONTRACT CHECKLIST

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- ☐ 1. Is there a provision governing access to records?
  - ☐ a. If so, is it consistent with the state's open records law?
- ☐ 2. Is there a provision indicating that the agency is not intending to create an employer-employee relationship?
- ☐ 3. Does the contract permit termination upon written notice to the other party without cause or additional liability?
- ☐ 4. If the agreement is with an Indian tribe:
  - ☐ a. Was notice of the agreement published?
  - ☐ b. Have all required hearings been held?
  - ☐ c. Has the agreement been approved by the Governor and the governing body of the tribe?
- ☐ 5. For owner-architect agreements, has any standard form been amended after consultation with the agency's assistant attorney general or special assistant attorney general?
- ☐ 6. Is the contract one that requires competitive bids?
  - ☐ a. If so, has the contract been awarded following competitive bids as required by law?
- ☐ 7. Does the state agency or official have the authority to enter into the contract?
  - ☐ a. Have sufficient funds been budgeted?
- ☐ 8. Does the other party have the authority to enter into the contract?
- ☐ 9. Is the contract in writing with all pages numbered?
  - ☐ If there are any exhibits or attachments referred to in the contract, are all the documents attached?
- ☐ 10. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
- ☐ 11. Are there any handwritten changes or other alterations to the contract?
  - ☐ If so, have all the changes or alterations been initialed by all signers?
- ☐ 12. Are the parties identified in the introductory paragraph or first clause?
- ☐ 13. Has the contract been checked for the following ambiguities and inconsistencies:
  - ☐ If recitals are used, are they unambiguous and consistent with the terms of the contract?
  - ☐ Are all references to parties, exhibits and other things internally consistent?
- ☐ 14. Are all terms unambiguous or clearly defined?
  - ☐ Is the contract written in plain English using the present tense and the active voice?

- Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
- Is the connective “and” used properly in the conjunctive?
- Is “or” used properly in the disjunctive?
- Is it clear to what any modifier or dependent clause refers?
- Where particulars are listed, is it clear whether the list is exhaustive?
- ☐ 15. If the contract contains a “liquidated damages” provision, are damages otherwise difficult to estimate in the event of a breach?
- ☐ 16. Are signatures dated and written in colored ink?
- ☐ 17. Is the name and title or position of each person signing the document listed below the signature line?
  - Do all signatures match the typed or printed names?
- ☐ 18. If contracting with a corporation:
  - has at least one officer of the corporation signed the document?
  - If contracting with a corporation, and if the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- ☐ 19. Does the contract specify both the date on which it begins and the date on which it ends?
- ☐ 20. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term, a provision terminating the contract without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
- ☐ 21. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- ☐ 22. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed as required by law?
- ☐ 23. Does the document include clauses regarding:
  - a. Force majeure – Delay or Default;
  - b. Applicable law;
  - c. Merger;
  - d. Assignment and delegation;
  - e. Subcontracting;
  - f. Modification;
  - g. Nondiscrimination and compliance with laws;
  - h. Severability;
  - i. Attorneys fees;
  - j. Notices;
  - k. Ownership of work product, equipment, or materials;
  - l. Spoliation; and

- m. Tax identification number.
- 24. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
- 25. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
  - a. Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

# **SAMPLE PERSONAL SERVICE CONTRACT**

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The parties to this contract are the State of North Dakota, acting through its [agency name] (STATE) and [contractor's legal name] (CONTRACTOR);

## **SCOPE OF SERVICE**

CONTRACTOR, in exchange for the compensation paid by STATE under this contract, agrees to provide the following services:

- [State what is to be done under the contract. This may be a brief statement, or may require an attachment setting out the scope of services in great detail.]

## **TERM OF CONTRACT**

The term of this contract is for a period of \_\_\_\_\_ months, commencing on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and terminating on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

## **COMPENSATION**

STATE will pay for the services provided by CONTRACTOR under this contract an amount not to exceed \_\_\_\_\_ per \_\_\_\_\_, to be paid \_\_\_\_\_.

## **TERMINATION OF CONTRACT**

- a. Termination without cause. This contract may be terminated by mutual consent of both parties, or by either party upon 30-days written notice.
  - i. Termination for lack of funding or authority. STATE may terminate this contract effective upon delivery of written notice to CONTRACTOR, or on any later date stated in the notice, under any of the following conditions:
    - (1) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term. The contract may be modified by agreement of the parties in writing to accommodate a reduction in funds.
    - (2) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract.
    - (3) If any license, permit or certificate required by law or rule, or by the terms of this contract, is for any reason denied, revoked, suspended or not renewed.

Termination of this contract under this subsection is without prejudice to any obligations or liabilities of either party already accrued prior to termination.



- b. Termination for cause. STATE by written notice of default to CONTRACTOR may terminate the whole or any part of this contract:
- i. If CONTRACTOR fails to provide services required by this contract within the time specified or any extension agreed to by STATE; or
  - ii. If CONTRACTOR fails to perform any of the other provisions of this contract, or so fails to pursue the work as to endanger performance of this contract in accordance with its terms.
  - iii. The rights and remedies of STATE provided in the above clause related to defaults by CONTRACTOR are not exclusive and are in addition to any other rights and remedies provided by law or under this contract.

#### **FORCE MAJEURE**

CONTRACTOR will not be held responsible for delay or default caused by fire, riot, acts of God or war if the event is beyond CONTRACTOR'S reasonable control and CONTRACTOR gives notice to STATE immediately upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

#### **RENEWAL**

This contract will not automatically renew. STATE will provide written notice to CONTRACTOR of its intent to renew this contract at least 60 days before the scheduled termination date.

#### **MERGER AND MODIFICATION**

This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

#### **SEVERABILITY**

If any term of this contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms must not be affected, and, if possible, the rights and obligations of the parties are to be construed and enforced as if the contract did not contain that term.

#### **ASSIGNMENT AND SUBCONTRACTS**

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE'S express written consent. However, CONTRACTOR may enter into subcontracts provided that any subcontract acknowledges the binding nature of this contract and incorporates this contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor.

CONTRACTOR has no authority to contract for or incur obligations on behalf of STATE.

#### **NOTICE**

All notices or other communications required under this contract must be given by registered or certified mail and are complete on the date mailed when addressed to the parties at the following addresses:

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**or**

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

#### **APPLICABLE LAW AND VENUE**

This contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this contract must be brought in the District Court of Burleigh County, North Dakota.

#### **SPOLIATION – NOTICE OF POTENTIAL CLAIMS**

CONTRACTOR agrees to promptly notify STATE of all potential claims that arise or result from this contract. CONTRACTOR shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect the evidence, including the scene of an accident.

#### **INDEMNITY**

Please see the contract drafting manual or the risk management manual to choose the best indemnity provision for your contract.

#### **INSURANCE**

Please see the contract drafting manual or the risk management manual to choose the best insurance provision for your contract.

#### **ATTORNEY FEES**

In the event a lawsuit is instituted by STATE to obtain performance due of any kind under this contract, and STATE is the prevailing party, CONTRACTOR shall, except when prohibited by N.D.C.C. § 28-26-04, pay STATE'S reasonable attorney fees and costs in connection with the lawsuit.

### **ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL**

STATE does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

### **CONFIDENTIALITY**

CONTRACTOR agrees not to use or disclose any information it receives from STATE under this contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this contract or as authorized in advance by STATE. STATE agrees not to disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota open records law, N.D.C.C. § 44-04-18. The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the term of this contract, or any extensions or renewals of it.

### **COMPLIANCE WITH PUBLIC RECORDS LAW**

CONTRACTOR understands that, except for disclosures prohibited in Section 17, STATE must disclose to the public upon request any records it receives from CONTRACTOR. CONTRACTOR further understands that any records that are obtained or generated by CONTRACTOR under this contract, except for records that are confidential under that section herein addressing confidentiality may, under certain circumstances, be open to the public upon request under the North Dakota open records law. CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the open records law and to comply with STATE'S instructions on how to respond to the request.

### **WORK PRODUCT, EQUIPMENT AND MATERIALS**

All work product, equipment or materials created or purchased under this contract belong to STATE and must be delivered to STATE at STATE'S request upon termination of this contract. CONTRACTOR agrees that all materials prepared under this contract are "works for hire" within the meaning of the copyright laws of the United States and assigns to STATE all rights and interests CONTRACTOR may have in the materials it prepares under this contract, including any right to derivative use of the material. CONTRACTOR shall execute all necessary documents to enable STATE to protect its rights under this section.

### **INDEPENDENT ENTITY**

CONTRACTOR is an independent entity under this contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workers' Compensation Act. CONTRACTOR retains sole and absolute discretion in the

manner and means of carrying out CONTRACTOR'S activities and responsibilities under this contract, except to the extent specified in this contract.

#### **NONDISCRIMINATION AND COMPLIANCE WITH LAWS**

CONTRACTOR agrees to comply with all applicable laws, rules, regulations and policies, including those relating to nondiscrimination, accessibility and civil rights. CONTRACTOR agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes and unemployment compensation and workers' compensation premiums. CONTRACTOR shall have and keep current at all times during the term of this contract all licenses and permits required by law.

#### **STATE AUDIT**

All records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this contract are subject to examination by the North Dakota State Auditor or the Auditor's designee. CONTRACTOR will maintain all such records for at least three years following completion of this contract.

#### **PREPAYMENT**

STATE will not make any advance payments before performance by CONTRACTOR under this contract.

#### **TAXPAYER ID**

CONTRACTOR'S federal employer ID number is: \_\_\_\_\_.

#### **PAYMENT OF TAXES BY STATE**

State is not responsible for and will not pay local, state, or federal taxes. State sales tax exemption number is E-2001, and certificates will be furnished upon request by the purchasing agency.

#### **EFFECTIVENESS OF CONTRACT**

This contract is not effective until fully executed by both parties.

CONTRACTOR

STATE OF NORTH DAKOTA  
Acting through its

\_\_\_\_\_  
(agency)

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_



# **SAMPLE LEASE FOR OFFICE SPACE**

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This lease is entered into by \_\_\_\_\_, the owner of the premises described in Paragraph 1 (LANDLORD), and the State of North Dakota, acting through its \_\_\_\_\_ (agency) (STATE).

## **SCOPE OF LEASE**

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by STATE, hereby leases to STATE the following described premises situated in the city of \_\_\_\_\_, county of \_\_\_\_\_ and state of North Dakota:

[Insert property description]

## **TERM OF LEASE**

The term of this lease is for a period of \_\_\_\_\_ months, commencing on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and terminating on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

## **RENTAL PAYMENTS**

STATE will pay rent for the premises, consisting of \_\_\_\_\_ square feet, at \$\_\_\_\_\_ per square foot per annum, or \$\_\_\_\_\_ per annum. Rent will be paid in advance by the 10th day of each month in a monthly amount of \$\_\_\_\_\_, which is 1/12 of the annual amount, commencing on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and continuing monthly thereafter for the term of this lease. Rent is payable at the address of LANDLORD, which is \_\_\_\_\_, unless STATE is notified otherwise in writing by LANDLORD.

## **LANDLORD'S OBLIGATIONS**

LANDLORD agrees:

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the premises.
- b. To perform all required maintenance for the premises, including all janitorial services, which will be done on a daily basis, including furnishing of related supplies.
- c. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants and trees on the premises.

- d. That if other portions of the building are leased to other parties, LANDLORD shall not permit any activity to be conducted in other portions of the building or grounds that will materially interfere with STATE'S use and enjoyment of the premises.
- e. That STATE may install items that it deems necessary for maximum and optimum utilization of the premises. STATE may, at any time, remove from the premises all fixtures and other equipment owned by STATE, provided the removal is completed by termination of this lease or any renewal or extension. STATE agrees to repair any damages that may be done to the premises resulting from the removal of the items.
- f. STATE may place decorations, wall hangings, signs and directories upon entrance doors, in hallways leading to its premises, or doors and walls within the premises.
- g. To furnish \_\_\_\_\_ automobile parking stalls for use by STATE, its agents or designees, in the lot provided for use by the building tenants.
- h. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the premises.

**STATE'S OBLIGATIONS.**

For the term of this lease, and any renewals or extensions, STATE agrees:

- a. To pay the rent when due.
- b. To pay for its own telephone service.
- c. To keep the premises in reasonable condition the same as at the commencement of the term or as it may be put by LANDLORD, except for reasonable use and wear, and damage by fire and unavoidable casualty.
- d. Not to make any unlawful, improper, or offensive use of the premises, and to observe all the laws of the State of North Dakota and the ordinances of the city of \_\_\_\_\_ in force from time to time relating to the leased premises.
- e. To permit LANDLORD at all reasonable times to enter and examine the premises and to make necessary repairs for the protection of the premises.
- f. To surrender the premises to LANDLORD at the end of the term; and, in default of the payment of rent due or failure to perform its obligations under this lease, to surrender the premises upon demand made by LANDLORD.

- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by STATE.

#### **TERMINATION OF LEASE**

It is expressly understood and agreed that STATE has no obligation under this lease for the initial or succeeding terms if the North Dakota Legislature fails to appropriate to STATE sufficient funds to defray the full rental costs. STATE, without any liability, may terminate this lease by providing thirty (30) days written notice, if its legislative appropriations are reduced or if its authority to spend its appropriations is reduced or limited by law or by reductions in federal or other grant funds to a point STATE, in its sole discretion, deems insufficient to pay the full rental cost for the remainder of the term of this lease. During the term of this lease or any renewal or extension, STATE may terminate this lease by providing thirty (30) days written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this lease, or if STATE determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rules.

#### **TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES**

If the leased premises are destroyed or damaged by fire or the elements to the extent they become untenable, then this lease immediately terminates, unless LANDLORD, within twenty (20) days of the happening of the event, gives written notice of intention to restore the building and fully restores the premises within a reasonable time. During the term between destruction and restoration of the premises rent will not be due.

#### **HOLDING OVER**

If STATE remains in possession of the premises after the lease expires, and LANDLORD accepts rent from it, the lease will be deemed renewed on a month-to-month basis.

#### **MERGER**

This lease is the entire agreement between the parties, and no modification of it will be binding unless evidenced by written agreement signed by the parties.

#### **SEVERABILITY**

If any term or provision of this lease is declared by a court of competent jurisdiction to be invalid, the validity of the remaining terms will not be affected, and the rights and obligations of the parties will be construed and enforced as if the lease did not contain the term or provision held to be invalid.

#### **ASSIGNMENT**

This lease must not be assigned or subleased by STATE unless LANDLORD endorses its written consent to the assignment or sublease. This lease must not terminate by reason of any sale of the premises by LANDLORD to third parties, but must continue throughout the entire term.



**NOTICE**

Whenever the term “written notice” or “in writing” is used in this lease, mailing of the notice must be by certified mail sent to:

or

Notice provided under this provision does not meet the notice requirements for monetary claims against the State under N.D.C.C. § 32-12.2-04.

**APPLICABLE LAW**

This lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action commenced to enforce this lease must be brought and solely litigated in the District Court of \_\_\_\_\_ County, North Dakota

**SPOILIATION – NOTICE OF POTENTIAL CLAIMS**

LANDLORD agrees to promptly notify STATE of all potential claims that arise from or result from this lease. LANDLORD shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect the evidence, including the scene of an accident.

**INDEMNITY**

Please see the risk management manual to choose the best indemnity provision for your contract.

**INSURANCE**

Please see the risk management manual to choose the best insurance provision for your contract.

**CONFIDENTIALITY**

The LANDLORD acknowledges that the STATE possesses substantial amounts of information at the leased premises that is confidential pursuant to state law. The LANDLORD agrees that if it views, comes into possession of, or otherwise becomes knowledgeable of confidential information located at the leased premises, the LANDLORD will maintain the confidentiality of that information and will refrain from redisclosing that information to any third party. The LANDLORD agrees to require, by contract, any agent it retains to fulfill its obligations otherwise set out in this lease to similarly maintain the confidentiality of any information it views, comes into possession of or otherwise becomes knowledgeable of. Those indemnity provisions otherwise set out in the lease agreement specifically apply to this confidentiality requirement.

**EFFECTIVENESS OF LEASE**

This lease is not binding on STATE until it is reviewed by the Office of Attorney General and approved by the Facility Management Division, Office of Management and Budget, as required in N.D.C.C. § 54-21-24.1.

LANDLORD

STATE OF NORTH DAKOTA

Acting through its

\_\_\_\_\_  
(agency)

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

FORM APPROVED BY ATTORNEY GENERAL:

BY: \_\_\_\_\_

DATE: \_\_\_\_\_

APPROVED BY FACILITY MANAGEMENT:

BY: \_\_\_\_\_

DATE: \_\_\_\_\_